
The *Hillis* decision and water rights permitting

Issue

The Washington State Supreme Court issued a decision in March 1997 that affects the Department of Ecology's water rights permitting process. The court's 5-4 decision in *Hillis v. State Department of Ecology* held that certain agency policies regarding water rights decision-making should have been adopted as formal rules.

Background

In 1993 and 1994, the Department of Ecology experienced dramatic cuts in funds for water rights administration. Ecology responded to those cuts by setting priorities for processing water right applications. Ecology placed highest priority on protecting public health and safety, providing for short-term uses of water, and allowing transfers of existing rights between willing parties. Ecology also adopted the basin assessment approach to making water rights decisions. This approach involved compiling available information for an entire watershed, then using that information to make decisions on all pending applications within that basin. Because Ecology could not conduct these studies on all watersheds simultaneously, the agency *ranked* the state's 62 watersheds in order of priority for conducting these assessments.

In 1992, Larry and Veralene Hillis applied for water rights to provide water for a residential subdivision they planned to build in the Kittitas Valley. In 1994, frustrated by inaction on their applications, they filed a lawsuit in Kittitas County Superior Court asking that Ecology immediately process their applications for water rights. The Superior Court issued an order requiring the applications to be processed immediately. The same order invalidated Ecology's policy decisions (made without formal rule-making) to process certain water right applications ahead of others, to rank watersheds throughout the state for watershed assessments, and to defer processing water right applications in geographic areas pending completion of watershed assessments. Ecology appealed directly to the Washington State Supreme Court.

Issues in the *Hillis* Case

The Supreme Court ruled on four issues in this case that impact Ecology's procedures for processing water right applications. The Supreme Court also agreed with the lower court's ruling that Ecology need not pay Hillis' attorney fees.

Issue 1: Must Ecology immediately process the Hillis' water right applications? The Supreme Court ruled that applications within a geographic area must be considered in order of priority. The Hillis' applications were not the oldest within the watershed. Processing the Hillis' applications ahead of others in the same geographic area would violate the rights of the senior applicants.

Issue 2: Must Ecology stop conducting watershed assessments until all pending applications were decided? The Supreme Court ruled that Ecology may continue watershed assessments before processing all pending ground water applications. The court held that Ecology does have specific statutory authority to conduct assessments and deferred to Ecology's views as to the logic and efficiency of the assessment approach. The court also found that there was no evidence to

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support the allegation that Ecology was conducting watershed assessments in lieu of investigating water right applications.

Issue 3: Has Ecology always processed applications in the order they were filed? The Supreme Court ruled that priority date has never been the only criteria used by Ecology to determine the order of processing applications statewide. The Court found that Ecology has historically also considered the number of pending applications within a geographic area, how much information is available, what is known about the aquifers and potential impairment, and other health and safety issues. The court acknowledged Ecology's historical practice of investigating groups of applications within a geographic area, and the agency's need to manage resources by assigning staff to specific geographic areas.

Issue 4: Are certain decisions invalidated because Ecology did not first make rules? The Supreme Court found Ecology made some policy decisions that should have been adopted as formal rules:

- Ecology's decision to prioritize public health emergency applications, applications for changes to existing water rights, and short term applications ahead of other types of applications statewide;
- Ecology's decision to defer processing applications within a geographic area until a watershed assessment has been completed, and
- Ecology's decision to rank watersheds across the state for assessments.

This ruling means that Ecology must adopt formal rules on setting priorities for water rights permit decisions. The rule-making process must ensure that the public can participate in making broad policy decisions about water rights. The court did not invalidate individual water right decisions Ecology made through the watershed assessment process. The court also found that Ecology may conduct watershed assessments, but may not make the completion of an assessment a requirement or pre-requisite to making decisions on applications without first adopting rules.

How is Ecology responding to the *Hillis* decision?

Ecology can no longer elevate emergency, "change" applications, and short term applications ahead of others, nor can it defer processing applications pending the outcome of an event, such as a watershed assessment, without first adopting administrative rules specifying the procedural changes. The decision does not mean that Ecology must halt all water rights permitting activities pending rulemaking.

Ecology adopted an emergency rule effective May 7, 1997 to allow the agency to give priority to certain types of applications, specifically those for emergency health and safety issues.

The emergency rules will be effective for 120 days and may be extended for an additional 120 days. During that period, Ecology will undertake rulemaking to adopt a permanent rule concerning priorities, as well as to define the role and process of watershed assessments, criteria for ranking watersheds, and criteria for deferring processing of pending applications. The rulemaking process will include extensive public involvement, and may take up to one or more years to complete.

For More Information

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